

FOOTBALL ASSOCIATION REGULATORY COMMISSION

THE FOOTBALL ASSOCIATION

-and-

MARC BOLA

Further Hearing 16th December 2021 (by Microsoft Teams).

Commission: Richard Smith QC (Chairman)

Gareth Farrelly

Udo Onwere

Paddy McCormack – Judicial Services Manager – Secretary

For the Player

Christina Michalos QC – Counsel

John Shea – Senior Associate, Lewis Silkin LLP (observer)

For The FA

Kate Gallafent QC – Counsel

Amina Graham – Head of Regulatory Advocates Department (observer)

Rebecca Turner – Barrister (observer)

FURTHER REASONS OF THE REGULATORY COMMISSION CONCERNING AN APPLICATION TO EDIT

THE WRITTEN REASONS OF THE COMMISSION

1. These Further Written Reasons concern an application by the Player to edit the content of the Written Reasons provided for publication by the Regulatory Commission, and should be read in conjunction with the Commission's Written Reasons dated the 4th November 2021.

The Application

2. Subsequent to the distribution of the Commission's Written Reasons dated the 4th November 2021 to the Parties, the Player made an application that a part or parts of the Written Reasons be redacted or edited before publication by The FA.
3. It is for the Regulatory Commission to decide what is contained in the Written Reasons. Separately, it is for The FA to decide whether those completed Written Reasons are published. The FA had made clear that they proposed to publish the Reasons. The merits of this application were for the Commission, mindful that whatever was contained in the Written Reasons would subsequently be published by the FA.
4. The Commission had full regard to all the matters raised in documentation provided to the Commission in advance of the Hearing held on the 16th December 2021. Similarly, the Commission were assisted by the helpful submissions made by Leading Counsel for the respective Parties. In so far as the matters raised in the various submissions are not dwelt upon in these Reasons, it should not be thought that the Commission has not considered those matters and given them the weight they see fit.

The Approach to the Application

5. Having regard to the provisions of FA Disciplinary Regulation 18, the expectation in concluded proceedings of the kind concerning this Player, is that The FA will publish the Written Reasons provided by a Regulatory Commission.

“Each Participant will take part in any ... Regulatory Commission ... as required to ensure the appropriate discharge of these Regulations and acknowledges that reports of decisions will be published.”

6. The Regulations do not further detail circumstances in which, by exception, publication would not take place either in whole, or as here, in part. Such absence of regulatory provision is not a bar to the Commission ‘editing’ their reasons as shared with the Parties if such a course meets the justice of the particular case. There have of course been past examples where Written Reasons have been published with redactions. The Parties were united in their approach to the principle of the application in this regard.
7. The Commission considered in what circumstances an applicant might in principle be successful in seeking to edit the content of a Commission’s Written Reasons. The Commission, who were mindful of a proper need for a transparent consistency of approach to Regulatory process, concluded that it would only be in exceptional circumstances that a Player would, *prima facie*, be able to seek to edit the Written Reasons of a Commission. Those exceptional circumstances would also necessarily have to be of a kind to outweigh the competing interest of transparent disclosure as is anticipated by Regulation 18.
8. Accordingly, there was a balance to be struck between the competing interests of the Player and The FA’s expectation to full publication. The answer to that balancing exercise in the Commission’s judgement was of a kind to ensure that the proceedings remained *“just and fair to all parties”*. That being the overarching and paramount objective understandably provided for by The FA in its Regulations.
9. In written submissions provided to the Commission, the Player had sought to suggest that he was entitled to the specific protection afforded to him by Article 8 of the Human Rights Act, in terms of privacy and otherwise. It was suggested that the rights afforded by that Article outweighed the competing Article 10 rights to freedom of expression in respect of publication of Regulatory decisions.
10. In answer to the Player’s assertions regarding the applicability of the Human Rights Act, The FA noted that The FA is not a public authority. Further, it was argued that Article 8 is only engaged where the person seeking the protection of the Article has a reasonable

expectation of privacy in the respect of the relevant proceedings. The Player, it was said, had no such expectation in circumstances where the Regulations relevant to his having been charged, provide that *'reports of decisions will be published'*.

11. In oral submissions to the Commission, and in response to specific questions from the Commission as to whether it remained the Player's case that he had an entitlement under the Act in the circumstances of these proceedings, Miss Michalos QC did not make such claim and suggested that it was not in fact "necessary" for the Commission to consider whether the relevant 'rights' were afforded to the Player; rather, the Commission were simply invited to take 'guidance' from the principles set out variously in Articles 8 and 10.
12. The Commission make no ruling on the applicability or otherwise of any Article 8 rights in this case. However, in balancing the competing interests central to this application to ensure a just and fair conclusion to all parties, the Commission had regard to the sense and intent of the competing rights afforded by the Act.

The Player's case

13. It was the Player's case that the circumstances of this misconduct taken together with the Player's individual circumstances, were of a kind to demand that the balance of the competing interests fell in favour of editing the Written Reasons. The Player contended that the effect of publishing the detail of the tweet written many years ago when the Player was a teenager, would have such an adverse effect upon him that it could properly be said to be disproportionate to the competing need to publish Written Reasons in full.
14. In support of that contention, the Player's representatives pointed primarily to the fact that the tweet had been posted many years ago when the Player was then only 14 years of age, that the tweet is presently not in the public domain, and that to publish the detail of the tweet would result in scrutiny of the Player (most notably on social media) so as to cause significant concern for the welfare of the Player and others connected to him.
15. Against that background, the Player gave evidence to the Commission concerning his personal circumstances and his concerns regarding the consequences of publishing the detail of the tweet in the Commission's Written Reasons.

16. In the presentation of the Player's case before the Commission, Miss Michalos QC suggested that the balance of the competing interests could only be fairly and satisfactorily met by removing the wording of the tweet from the Reasons, *together* with the description of the tweet set out in paragraph 9 of the Reasons. It was acknowledged that the tweet was elsewhere described to be homophobic.
17. As the Commission detail hereinbelow, that was a submission that was not entirely consistent with the position previously adopted by the Player in correspondence dated the 17th November 2021, namely that it would strike a fair balance in the favour of the Player to edit the specific wording of the tweet but *retain* the content of paragraph 9.

The Case for The FA

18. Whilst not intending to cause the Player any 'undue distress', The FA opposed the Player's application noting in doing so that they sought "*to maintain transparency in the disciplinary processes and to provide Participants (and the wider public) with the full context behind these regulatory decisions.*" Publication in full of a Commission's Written Reasons was, it was argued, an important part of the Regulatory process both in respect of transparency and the public's overall understanding of a case. Full publication was argued to be necessary so that future parties concerned with comparative cases of misconduct would be best placed to make the necessary comparisons from the Written Reasons in this case.
19. The FA further noted the importance of consistency in circumstances where the publishing of the details of what a Participant had posted on social media had taken place in all other previously decided cases involving historic social media posts which amounted to Aggravated Breaches.
20. Accordingly, The FA was of the view that the balance to be struck between the individual circumstances of the Player and those identified by The FA fell in favour of complete publication of the Commission's Reasons.

The Commission's Further Reasoning

21. The Commission considered whether there was anything in the circumstances of the case and/or the Player's individual circumstances that were properly described as exceptional. Only in those circumstances did the Commission consider it appropriate to consider the editing of the Written Reasons. If exceptional circumstances existed, then the extent of any consequent editing would be weighed against the competing interests relied upon by The FA.
22. At the heart of the Player's application was the concern raised regarding the consequences to the Player and others resulting from the 'inevitable' reaction (and in particular social media reaction) to the publication of the full details of the tweet posted. It was in this context that it was submitted on the Player's behalf that revelation of the detail of the tweet would result in a so-called social media 'pile on' of offensively acrimonious comment portraying the Player in the public eye in a fashion that was inconsistent with the totality of the Commission's findings and without regard to the full context of the circumstances of the case, which included the historic nature of the post and the profound change in the Player's circumstances since the date of the posting.
23. The Commission accepted that it would be both incorrect and naive to conclude other than that an adverse public reaction, in part at least, was to be expected if the precise wording of this particular tweet were put into the public domain when it otherwise wasn't. However, that is the position common to a number of other aggravated misconduct cases of this kind.
24. The Commission were not satisfied that the simple prospect of an adverse (and perhaps ill informed) public reaction to an emotive subject matter was sufficient to demand a departure from the ordinary expectations of publication. To accede to an application to edit the content of a Commission's Written Reasons on that basis alone would lead to the unsatisfactory conclusion that all emotively controversial misconduct proceedings would result in the non-publication of the Commission's reasoning by fear of inappropriate public reaction. That would be quite wrong, not least as it would do nothing to support

the crucial importance of ensuring that homophobic behaviour was properly addressed and adjudicated upon in a transparent public context.

25. In the circumstances of this Player's individual case, the Commission took the view that the key consideration was not whether there was to be a public reaction per se, but rather what the effect or otherwise of any such reaction on this particular Player could properly be said to be. The Commission enquired of itself whether there was evidence (beyond speculation or inference) as to the foreseeable effect upon the Player of a kind that was exceptionally different to that which would be sensibly expected of any person whose misconduct had been revealed to the more general public.
26. In this respect the Commission saw a particular importance in the evidence they heard from the Player himself. What was said, why it was said, and how it was said.
27. The Player spoke emotively and sincerely as to a number of personal concerns he had about the effect there would be upon him and his family if the detail of the tweet the subject of his misconduct was published in the Written Reasons. It is neither right or necessary that the Commission repeat the detail of those personal concerns held by the Player regarding his past experiences, welfare and mental wellbeing, or the specific concerns expressed about those around him. The Player's evidence also included reference to his concerns regarding the effect publication of the detail of the tweet would have on community projects with which he was directly concerned.
28. The Commission concluded that the Player's concerns for his and others welfare were both genuine and of a kind that stood up to scrutiny. Matters relating to a potentially significant effect upon an individual Player's wellbeing are of obvious importance in considering the 'individual' and especial nature of his particular case. Further, the Commission accepted that others looking in on the Player had genuinely expressed their 'serious' concern for his 'mental health'.
29. The significance of the effect upon the Player also had to be seen in the context of the other features of the case relevant to the consideration as to whether the case was correctly described as exceptional. In this regard the Commission considered the fact that the Tweet was posted many years ago and when the Participant was only 14 years of age.

More significantly, the Commission also considered the fact that the wording of the Tweet is not in the public domain.

30. The Commission concluded that taken individually or collectively these 'other' factors, whilst standing this case apart from many of an apparently similar kind, were not themselves truly exceptional. However, they provided an important and relevant context in which the significance of the individual circumstances attributable to the Player himself had to be further judged.
31. After careful consideration and not without some hesitation, the Commission concluded that the Player's personal circumstances taken together with the other individual features of his case, were rightly described to be exceptional and of a kind that required a departure from the usual starting point that the Written Reasons would be published in full.
32. Having so concluded, the Commission went on to consider to what extent the Written Reasons should be edited to reflect the need to accommodate the exceptional circumstances of the Player, whilst at the same time balancing the competing need to ensure that the content of the Reasons still provided sufficient clarity and transparency to allow for the public's overall understanding of the case and for proper comparative assistance to be drawn from it in the future should the need be.
33. In her submissions to the Commission, Miss Michalos QC contended that a fair balance of the competing interests could only be achieved by editing both the detail of the wording of the tweet and the descriptive reference to it appearing at paragraph 9 of the Written Reasons. That was a submission that did not find favour with the Commission.
34. To edit the Reasons in the manner proposed by Miss Michalos QC would in the judgment of the Commission have wholly removed the sense and transparency of the reasoning of the Commission. With such proposed editing, the sanction imposed would have been left to be viewed in an unacceptable void. That would not in any way reflect a fair balance of the competing interests as between the respective parties and would not have resulted in a just and fair outcome to *both* parties.

35. The Commission concluded that the exceptional circumstances of the Player's case could fairly be met by editing the precise wording of the tweet from the Written Reasons. That editing alone leaves sufficient detail for those reading the Reasons to be able to understand the context and reasoning of the Commission's approach to sanction, having particularly in mind that paragraph 9 of the Written Reasons is important to a proper understanding of the decision and the nature of the tweet posted. Accordingly, by editing the Reasons in that way a fairness is afforded to both parties in these unusual circumstances.

36. In arriving at that conclusion, it is implicit that the Commission took the view that there was an important and distinguishable difference to the detrimental consequences to the Player as between the publication of the description provided for in paragraph 9, and the publication of the exact wording of the particular tweet in this case.

37. It is also relevant to note (and as previously referred to herein above at paragraph 17) that the editing of the Reasons in the way decided upon by the Commission is in fact in terms that were previously described by those representing the Player as striking a fair balance in the favour of the Player.

Decision of the Commission

38. The Written Reasons of the Commission will not include the words contained in the tweet posted by the Player.

39. In reaching this decision the Commission make clear that the decision to edit the Written Reasons is a reflection of the Player's individual circumstances in the context of his individual case. Accordingly, the Commission observe in the clearest terms that the decision is neither designed or intended to be a precedent for other future cases of a supposedly similar kind. The decision of this Commission is specific to the individual Player and his exceptional circumstances as the Commission have found them to be.

Richard Smith QC (Chairman)

Gareth Farrelly

Udo Onwere

24th December 2021